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238-775—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 713

ROBERT L. STRAUSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 363 F. 2d 366 (Pet. App. 1–5). The opinion of the court of appeals, affirming the original conviction is reported at 311 F. 2d 926 (Pet. App. 6–16). Certiorari was denied, 373 U.S. 910. The per curiam opinion of the court of appeals affirming denial of an earlier motion for a new trial on the basis of newly discovered evidence is reported at 337 F. 2d 853 (Pet. App. 17).

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1966. A petition for rehearing was denied on September 22, 1966. The petition for a writ of certiorari was filed on October 21, 1966. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly denied petitioner's second motion for a new trial based on allegedly newly discovered evidence.

STATUTES AND RULE INVOLVED

18 U.S.C. (1958 ed.) 152, at the time of the events here involved, provided pertinently:

> Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 371 provides pertinently:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 33, F.R. Crim. P., prior to July 1, 1966, provided as follows:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new

judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.[1]

STATEMENT

Petitioner seeks review of the denial of his second motion for a new trial based on newly discovered evidence, which denial was upheld by the Fifth Circuit on appeal. Petitioner was convicted on an indictment in the United States District Court for the Southern District of Florida alleging that he and co-defendant Goodman, in contemplation of the bankruptcy of a corporation of which they were officers, conspired to transfer and conceal assets of that corporation in violation of 18 U.S.C. 152, 371 (Supp. R. 13–18).[2] Goodman pleaded guilty (Pet. App. 6). On February 2, 1962, after a jury trial, petitioner was given a sentence of two years, four months in prison and the balance on probation (Supp. R. 37–38). The conviction was affirmed. *Strauss* v. *United States*, 311 F. 2d 926, certiorari denied, 373 U.S. 910.

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[1] Rule 33, as revised slightly, effective July 1, 1966, is set out in the petition (Pet. App. 22).

[2] Following the same designation as in the petition, "R." refers to the record in the present proceeding, and "Supp. R." to the record at trial. We have also lodged with the Court the record of the proceeding on the first motion for new trial based on newly discovered evidence, which is referred to herein as "2d Supp. R."

1. The evidence on which petitioner was convicted is summarized in the opinion written by the court of appeals in affirming the conviction (Pet. App. 6–14). In brief, it showed that in 1956 petitioner and Goodman, stating that they were sole stockholders of Harold Corporation, entered into a written agreement dated February 1, 1956, with one Jeri Bolton by which she agreed that, for a consideration, she would allow her name to be used in corporate transactions. The corporation acquired a long-term lease on the Cadillac Hotel at Miami Beach and plans were made for doubling its size (Supp. R. 207, 480). Harold Corporation acquired funds from a Miami bank through a construction loan totaling $1,250,000 and from other sources in 1956 and 1957. It was adjudicated a bankrupt in June 1958.[3]

The government's evidence showed a number of transactions by which money was withdrawn from the corporation without any apparent consideration. Some of these implicated petitioner directly.[4] Jack

[3] Incident to obtaining the loan, the corporation submitted a copy of the construction contract, which called for payment of the $1,250,000 to Cal Kovens Construction Company, to cover the entire costs of the job (Supp. R. 82–92). The day after the loan was closed, this agreement was superseded by one in which the construction company agreed to supervise the work for a total fee of $50,000, while the corporation assumed the payment of all building costs directly (Supp. R. 93–96).

[4] On November 15, 1956, the Kovens Company drew $45,000 on the special construction account set up by the lending savings and loan company (Supp. R. 96–98), and paid the same amount to Harold Corporation, which paid the same amount to petitioner, all on the same day (Supp. R. 384, 401, 405, 423–424). The check payable to petitioner bore the endorsement "Robert L.

Low, a former manager of the Cadillac Hotel and president of Harold Corporation, testified that he was directed to cash company checks payable to Miss Bolton and give the proceeds either to Goodman, to petitioner, or to wire them to the Rhodes Optical

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Strauss", which a handwriting expert testified at trial was executed by petitioner (Supp. R. 401, 405, 466–467; Govt. Exh. 52).

Photocopies were introduced of the following checks drawn on Harold Corporation's account with the Pan American Bank by Robert L. Strauss, payable either to himself or to cash and purporting to bear petitioner's signature both as drawer and endorsee (Supp. R. 271–277):

July 25, 1956 (Govt. Exh. 24)	$17,500
Sept. 28, 1956 (part of Govt. Exh. 25)	4,000
Oct. 1, 1956 (part of Govt. Exh. 25)	6,000
Oct. 1, 1956 (part of Govt. Exh. 25)	4,000
Oct. 17, 1956 (part of Govt. Exh. 26)	1,400
Nov. 1, 1956 (part of Govt. Exh. 26)	1,700
Nov. 9, 1956 (part of Govt. Exh. 26)	8,425
July 31, 1956 (Govt. Exh. 27)	11,250

Photocopies were introduced of two checks purportedly drawn by Jeri Bolton on the Mercantile National Bank, payable to Robert L. Strauss and endorsed "Robert L. Strauss" (Supp. R. 315–319):

Dec. 10, 1956 (Govt. Exh. 34)	$16,000
Dec. 19, 1956 (Govt. Exh. 35)	7,500

Also introduced was a photocopy of a check of the corporation drawn on the Miami Beach First National Bank, payable to Robert L. Strauss and Ray Goodman, dated October 11, 1956, in the amount of $25,500 (Supp. R. 401–405; Govt. Exh. 51). The endorsement of petitioner thereon was genuine in the opinion of the government's handwriting expert (Supp. R. 466–467).

The Pan American Bank made a loan of $330,000 to the corporation on March 20, 1957, which was paid out by the corporation on the same day (Supp. R. 266–270). Included in the payments was a check for $111,000, drawn by petitioner, to Florida International Corporation, a company of which petitioner was treasurer (Supp. R. 158, 529, Govt. Exh. 51).

Company in Atlanta. He could not identify these occasions with any particular checks (Supp. R. 213, 216, 218, 220, 225).

On cross-examination, Low reiterated that he could not remember the disposition made of any particular checks. He testified (Supp. R. 231):

> I remember on one occasion Mr. Strauss met me at the corner of the bank waiting for me to cash a check. It was a $15,000 or above; I remember that.

However, he could not tie this transaction to any check (Supp. R. 231). On another occasion he took a sum of money to Goodman's house and there was an exchange of funds with petitioner on the porch (Supp. R. 238).

2. In this second motion for a new trial,[5] petitioner sought to prove: (a) That the testimony of Jack Low that he had cashed checks involving company funds and given the proceeds to petitioner was perjured; (b) that petitioner's purported endorsements on three checks were forgeries;[6] and (c) that petitioner severed his relation with Harold Corporation on March 20, 1957.

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[5] In a prior motion, petitioner had sought a new trial on the basis of testimony of co-defendant Goodman before the bankruptcy court that petitioner and his wife sold all their stock and petitioner terminated all his participation in Harold Corporation on March 14, 1957 (2d Supp. R. 2–10).

[6] The checks were:

Govt. Exh. 51, a company check on the Miami Beach First National Bank, dated October 11, 1956, for $25,500, payable to Robert Strauss and Ray Goodman (note 4, *supra*).

Govt. Exh. 34, a check by Jeri Bolton on the Mercantile National Bank, dated December 10, 1956, for $16,000, payable to petitioner (note 4, *supra*).

Govt. Exh. 35, a check by Jeri Bolton on the Mercantile National Bank, dated December 19, 1956, for $7,500, payable to petitioner (note 4, *supra*).

(a) Low was called by petitioner and questioned about the occasion when he had delivered money to petitioner outside the bank. Several pages of his 1962 testimony were read to him and he was then asked (R. 9):

> Q. Now, I believe you stated that the funds from this particular check you say today, was given to Mr. Strauss, is that correct?[7]
>
> A. To the best of my memory, this is the check in which the funds were given to Mr. Strauss, yes.

Further cross-examined as to this occurrence, Low stated that he could not connect it with any particular check. He admitted that a deposit slip to the Bolton account in the Mercantile National Bank, dated August 27, 1957, for $15,000 was in his handwriting and indicated the possibility or likelihood that he himself had deposited the proceeds of the check in the Bolton account. He testified similarly to a check for $21,000 payable to Jeri Bolton, dated August 29, 1957, and another deposit slip in this amount for the latter date (R. 19–22).[8]

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[7] The check referred to was Govt. Exh. 15 at trial, a company check to Jeri Bolton, dated August 27, 1957, for $15,000. Low had not stated at any time, as asserted in the question, that the funds from this particular check had been paid to petitioner, but had always testified that he could only state that a "pattern" was followed, in which he would cash a check and deliver the proceeds as directed to one of three places. See *supra*, 5–6.

[8] Low did not, as petitioner asserts (Pet. 9), change his story after being confronted with the deposit slips. He had already testified, consistent with his testimony at the 1962 trial: "[T]here were a series of many, many checks" (R. 10); "The proceeds followed again, as I said before, a certain pattern. The exact proceeds of any one check I cannot tell you truthfully, but I

A certified public accountant testified that he had audited the books of Harold Corporation. In the first nine months of 1957 thirteen checks in the amount of $15,000 or above were issued. Only two were cashed, the foregoing checks to Jeri Bolton in the amounts of $15,000 and $21,000 (R. 36–38). Petitioner testified that Low at no time delivered $15,000 or any other sum of money to him. He stated that he was in Colombia the biggest portion of 1957, but that he could not be specific about dates (R. 101–102). A tourist card issued to petitioner and the certification of an official, based on the tourist card, that petitioner was in Colombia from August 18 to September 3, 1957, were exhibited to the court (R. 141–148).

(b) A handwriting expert testified on behalf of petitioner with respect to the purported endorsement by petitioner on Defendant's Exhibit 11 (Govt. Exh. 51 at trial), an enlargement of a microfilm of a company check dated October 11, 1956, payable to peti-

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can tell you the pattern" (R. 12); "I gave it, whether for this check or any check, I gave Mr. Strauss $15,000. I don't remember which check—* * * I said it possibly could have been this check. * * *. There were many checks and I don't recall which one it is, as it was seven or eight years ago. * * * To the best of my memory, it was in late August * * * '57. It was just about the time these checks were produced or in existence. There were many, many ramifications and there were deposits made, money withdrawn, checks cashed, and as I started to explain, you were reading the pattern of things—money was taken to the Western Union, taken and mailed to Rhodes Optical; and other monies were given back to him, and other monies he gave to his wife or to Mr. Strauss. There were a number of checks, or a series of checks, there were diversion of this constant routine" (R. 12–14). He also stated: "[I]t had to be at least a sum of more than two checks if there wasn't one, because I gave him the $15,000" (R. 18).

tioner, in the amount of $25,500 (notes 4, 6, *supra*). His initial answer was somewhat equivocal.[9] He later said that he did not consider the endorsement genuine because of irregularities in the lines caused by the pen of the writer moving slowly, inadvertent motion habits of the writer differing from those of petitioner, and differences in the designs of letters (R. 52–54).[10] For similar reasons he was of the opinion that the endorsements "Robert L. Strauss" on Government Exhibits 34 and 35, checks drawn by Jeri Bolton to petitioner, dated December 10 and 19, 1956, in the respective amounts of $16,000 and $7,500 (note 6, *supra*) were also not made by petitioner (R. 63–71).

(c) Petitioner alleged in his present motion for a new trial (R. 126):

> Recently, the defendant, while examining records to be used in connection with the defense of the income tax case aforementioned, found a certain document entitled "Release" which conclusively proves the defendant's separation from the affairs of the Harold Corporation after March 20, 1957. The defendant did

[9] Petitioner's expert's first answer was: "I found the questioned signature, Robert Strauss of the endorsement, Defendant's Exhibit No. 11, to have a resemblance in design to the example signatures, Government's Exhibit No. 1, 30–L and 30–M beyond what anyone who was not this Robert Strauss, but also had the name Robert Strauss, would cause a resemblance to be created, so that the signature on Government's Exhibit No. 11, Defendant's Exhibit No. 11, must be either genuine and written by Robert Strauss, the writer of the examples, or it must be an imitation" (R. 52).

[10] On the first motion for new trial hearing, Goodman, called by petitioner, testified that petitioner's endorsement on the check was genuine and that petitioner received the proceeds thereof (2d Supp. R. 70–72).

not recall the existence of the document until recently found, a copy of said document is attached hereto marked Exhibit "C" and made a part hereof.

This document, dated March 20, 1957, and signed by Jeri Bolton and Ray Goodman, released petitioner from all claims arising out of the tripartite agreement of petitioner, Goodman and Bolton, dated February 1, 1956.[11] At the hearing, petitioner testified that he started negotiating with Goodman in regard to Harold Corporation in late March 1956, that he was originally released from the corporation March 4 or 5, 1957, rejoined the company so that he could properly execute a mortgage to the Pan American Bank on March 14, 1957, then finally got out on March 20, 1957 (R. 100, 108). Defendant's Exhibit 8 is a release from the tripartite agreement and Defendant's Exhibit 9 is a release by Harold Corporation, both dated March 20, 1957 (R. 106).

ARGUMENT

Under the circumstances here, petitioner is plainly not entitled to a new trial on the basis of the proffered evidence. The district court did not abuse its discretion in denying petitioner's motion, the decisions below were therefore correct, and there is no occasion for review by this Court.

(a) The "newly discovered evidence" does not show perjury on the part of the witness Low. This witness testified at trial on direct examination that on a number of occasions he had cashed checks involving

[11] This agreement is set out in full in the Fifth Circuit's first opinion; see Pet. App. 8–10.

company funds and had given the proceeds either to Goodman or to petitioner, or sent them to a company in Atlanta, but that he could not connect these transactions with any particular checks. On cross-examination he recalled two specific occasions, one where petitioner followed him to the bank and received $15,000, or more; the proceeds of one or more checks. When called by petitioner as a witness on this motion and told that he had identified this transaction with a particular check for $15,000 cashed on August 27, 1957 (although there was no factual basis for this assertion), Low accepted it as true. However, he promptly corrected himself and reasserted his trial testimony a number of times before he was shown a deposit slip which indicated the $15,000 check was deposited to the Jeri Bolton account (*supra*, p. 7). Confusion thus induced as to details grown indistinct through the passage of years patently does not constitute perjury. Nor do we read the testimony of the accountant, called by petitioner, as excluding the possibility of the occurrence as originally testified to. In any event, evidence which is merely cumulative or impeaching is an insufficient basis for the granting of a new trial. *Mesarosh* v. *United States*, 352 U.S. 1, 9; *Ledet* v. *United States*, 297 F. 2d 737, 739 (C.A. 5).[12]

[12] Petitioner's reliance on *Mesarosh*, *supra*, is misplaced. Indeed, in the Court's opinion in that case it is expressly stated:

> It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an alle-

2. At trial petitioner offered no expert testimony to contest the genuineness of his signatures to the many incriminating checks introduced by the government. On the motion as originally filed, the validity of one of these endorsements was contested; by an amendment, two additional endorsements were questioned. The proper time for petitioner to have denied the execution of these endorsements by expert opinion testimony, or otherwise, was at trial. At best, this new evidence was impeaching in nature, and, as noted by the court below (Pet. App. 4–5), did not necessarily show that any "forgery" had occurred.

3. The newly discovered release by Jeri Bolton and Ray Goodman, which was attached to petitioner's new trial motion, is meaningless on its face. Bolton, by the admittedly genuine tripartite agreement, was a mere straw figure to front for petitioner and Goodman in activities in which they did not want their names to appear. At the hearing an additional and even more newly discovered release was presented which was purportedly executed by the corporation on the same date. There was substantial evidence at trial that petitioner did not terminate his relationship with the company at any of the dates mentioned at one time or another by petitioner or upon any other date. No evidence of such termination was presented. Moreover, even if petitioner had withdrawn from the corporation in March 1957, there was ample evidence

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gation by the defense ordinarily will not support a motion for a new trial, because new evidence which is "merely cumulative or impeaching" is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial (352 U.S. at 9).

to support his conviction on the basis of transfers and concealment prior to that time. The offense here charged could occur even before the corporation was formed. *Kaplan* v. *United States*, 7 F. 2d 594, 596 (C.A. 2), certiorari denied, 269 U.S. 582. Cf. *United States* v. *Rabinowich*, 238 U.S. 78, 85–86; *Alkon* v. *United States*, 163 Fed. 810 (C.A. 1).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966